BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CODY J. METCALFE	)	
Pro Se Claimant	)	
V.	)	
	)	Docket No. 1,066,451
ELITE TRANSPORTATION, LLC	)	
Respondent	)	
AND	)	
	)	
RIVERPORT INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent, Elite Transportation, LLC, and its insurance carrier request review of the October 19, 2015, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on February 18, 2016.

APPEARANCES

Cody J. Metcalfe, Pro Se, appeared not.[1] Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found respondent to be claimant's employer for the accident and injuries sustained on July 11, 2013, and further found respondent liable for any benefits paid on the claim. Future medical treatment was denied and there was no award of benefits based on permanent impairment. It was stipulated that 25.84 weeks temporary total disability

[1] Claimant's former counsel Jan Fisher, filed a motion to withdraw and was granted withdrawal by Order on January 13, 2015. Claimant was not present at the regular hearing. Claimant was not present at the hearing before the Board. All attempts by claimant's former counsel, the Kansas Division of Workers Compensation and the Workers Compensation Board to contact claimant have been unsuccessful.

compensation (TTD) was paid at $166.67 per week or $4,306.79 and $23,054.59 in medical treatment was also paid. No information was provided to identify the dates of the TTD payments or which health care providers were paid from the proceeds of the medical payments.

Respondent appeals, arguing first that the ALJ considered the exhibits to the preliminary hearing when they should not have been and that the ALJ failed to consider all of the issues presented by respondent. Respondent asserts the Board should find claimant failed to prove he was entitled to the medical expenses and TTD erroneously paid by Elite Transportation and its insurance carrier following the preliminary hearing, but affirm the denial of permanent impairment.

Claimant filed neither a submission letter to the ALJ nor a brief to the Board.

The issues on appeal are:

1. Was claimant an employee of Elite Transportation, LLC?

2. Did claimant meet with personal injury by accident arising out of and in the course of his employment with Elite Transportation, LLC?

3. Were the parties covered by the Workers Compensation Act?

4. Was claimant entitled to TTD and medical compensation in the absence of supporting documentation in the record?

FINDINGS OF FACT

Claimant was an employee of Burger King restaurant in Emporia, Kansas, when he learned, through his mother, that he could make a quick $150 in an overnight job. Claimant was contacted by a man named Troy, later identified as Troy Ross, who worked part-time for respondent and part-time for a company identified as Lanier. Claimant testified Mr. Ross informed him what the pay would be, what he would be doing, when he would leave and when he would get back. Claimant was told the job involved traveling to Minnesota and driving back one of three vans the company purchased. The trip was to take 24 hours and claimant would be paid $150. Claimant understood this was a one-time job with a slight possibility of something else down the line. Claimant was not given anything that identified his employer.

Claimant testified the only name he heard mentioned was Elite Transportation. The next day, after speaking with Mr. Ross, claimant went in and filled out some paperwork to set things up before they left. Claimant testified he went to the Elite Transportation building located in downtown Emporia to take care of the paperwork to have on file for his employment. Claimant did not have to take a drug test. He had to show his driver's

license. Claimant met the other people he would be working with and, 30 minutes later, they left for Minnesota in an SUV. The vans that were picked up in Minnesota had nothing on them identifying who owned them.

Claimant was injured in an accident in South Dakota on the way back from Minnesota on July 11, 2013. He does not remember the accident. He remembers waking up in the hospital. He was told that the van in front of him kicked up a piece of tire, claimant swerved to miss it, overcorrected and went into the ditch and flipped over. As a result of the accident, claimant shattered both knees, his right big toe was nearly ripped off and his right foot was fractured. He also had minor lacerations on his face, legs and feet. Claimant had surgeries on his knees and right foot. Claimant denies any prior problems with his knees, toes or feet.

When claimant was released from the hospital, Mr. Ross from Elite Transportation came and drove him back to Kansas from South Dakota. He has had no further contact with Mr. Ross since. Since the accident, claimant was not been able to completely bend his knees and cannot bend his toes or feet. He is able to walk using a cane. At the time of the preliminary hearing claimant remained off work per "doctor's orders."[2] There is no indication in this record as to how long claimant remained off work.

Claimant was paid $175 for driving the van back from Minnesota. He could not remember which company issued the check and he lost the stub. He testified to cashing the check because he needed to pay for his prescriptions. Claimant testified he is no longer in a lot of pain and only takes painkillers as needed. At the time of his deposition, claimant did not know his prognosis, and he had not yet been informed of any permanent damage.

Claimant's regular employment at the time was with Burger King, but he was not working there at the time of the regular hearing. Claimant was on temporary leave until released to return to work.

Vicki Hager, claimant's mother, testified she passed on some job information to claimant from her neighbor, James Vanvossen. Ms. Hager testified that Mr. Vanvossen works for Elite Transportation. She testified Mr. Vanvossen called her and asked if she knew anyone who would be interested in driving a vehicle back from a distant location, as his boss, Troy Ross, was looking for a driver. She indicated she never heard the name Lanier Trucking or anything about it. She testified that the first she learned of Lanier was when the dispute came up as to who employed claimant.

Ms. Hager found out about the accident from Mr. Vanvossen who was notified by Mr. Ross. Ms. Hager was distraught at that time so she does not remember much about

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[2] P.H. Trans. at 21.

those conversations. Once she found out claimant was going to be alright she focused on getting him home. She primarily dealt with Matt Noble, the safety coordinator. When Ms. Hager contacted Mr. Noble, the individual who answered the phone identified the number as Elite Transportation.

Ms. Hager also spoke with Gary Richards, with Riverport Insurance, about filling out an accident report for workers compensation. The paperwork was filled out over the phone and she indicated that claimant's employer was Elite Transportation. It wasn't until a problem arose with the accident that Lanier Trucking was mentioned.

Elvis Lindquist testified he is the owner of Elite Transportation and also has an ownership interest in Lanier Trucking. He testified that, on a daily basis, he deals with the operation and financial side of both companies. He is more involved with Elite Transportation than Lanier Trucking.

Mr. Lindquist is aware of claimant's accident in July 2013 and understood that one of the issues in claimant's workers compensation claim is who employed claimant. Mr. Lindquist testified claimant was not an employee of Elite Transportation or Lanier Trucking and that he was contracted for the day to drive a vehicle. He testified that any person hired would undergo a background check and a urinalysis test before being hired. Claimant underwent neither.

In Mr. Lindquist's mind, claimant was driving a Lanier Trucking titled van, therefore it would have been Lanier Trucking that hired or contracted claimant. Mr. Lindquist acknowledged claimant was paid $175 out of Elite Transportation's checkbook, and the check was cut by Troy Ross, who apparently did not know that the van was registered to Lanier Trucking. Mr. Lindquist testified the books were corrected to reflect that Lanier Trucking actually paid claimant and not Elite Transportation.

Mr. Lindquist was unaware Mr. Ross had hired anyone to drive the vans back to Kansas, until he learned of claimant's accident. He had not given Mr. Ross permission to contract with anyone for assistance. Mr. Lindquist testified Mr. Ross works in maintenance and takes care of the vehicles for Elite Transportation and Lanier Trucking. He also indicated Mr. Ross is paid by both companies, depending on who owns what vehicle and what he is doing. He also indicated that Elite Transportation does not have a lot of vehicles, so sometimes Elite Transportation contracts with Lanier Trucking to make runs. Mr. Ross had never transported any vehicles in this manner before this. He did not have Mr. Lindquist's permission to do so on this occasion. Mr. Lindquist acknowledged Mr. Ross would be in the best position to testify as to the contractual/employment arrangement with claimant.

Mr. Lindquist indicated he did not notify Lanier Trucking or its insurance carrier of the accident. He assumed claimant's mother or Mr. Ross had.

At the regular hearing, respondent denied claimant met with personal injury by accident arising out of and in the course of his employment; denied that the relationship of employer/employee existed on the date of accident; denied that respondent is covered by the Act; and denied that the accident was the prevailing factor causing an injury, need for medical treatment and resulting disability or impairment.

As the result of a preliminary hearing, claimant was paid $4,306.29 in temporary total disability compensation, pursuant to Court order and hospital and medical treatment was furnished in the amount of $23,054.59. Respondent requests reimbursement from the Fund for the moneys ordered paid.

Respondent contends claimant was hired short-term to provide transportation services for either Elite Transportation or Lanier Trucking. Respondent contends this does not constitute an employment relationship. It is an independent contract relationship.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(d) states:

> (d) "Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident'' shall in no case be construed to include repetitive trauma in any form.

Respondent contests claimant's alleged injury on more than one basis. Respondent contends claimant was an employee of Lanier Trucking, a companion company to respondent. However, the initial contact for this job was between claimant's mother and respondent's employee Mr. Vanvossen. Claimant initially dealt with Mr. Ross, an employee of both respondent and Lanier Trucking. However, claimant's mother, when she called and reached respondent, was connected to respondent and not Lanier Trucking. When

claimant was initially paid for the trip, the check was from respondent, even though Mr. Lindquist testified this was later changed to Lanier Trucking. The Board finds, if an employer/employee relationship did exist, it was between claimant and respondent, and not Lanier Trucking.

Respondent also argues claimant's relationship with respondent was as an independent contractor and not an employee.

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[3] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[4]

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control which renders one a servant, rather than an independent contractor.[5]

In addition to the right to control and the right to discharge the worker, other commonly recognized indicators of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.

(2) The independent nature of the worker's business or distinct calling.

(3) The employment of assistants and the right to supervise their activities.

(4) The worker's obligation to furnish tools, supplies and materials.

(5) The worker's right to control the progress of the work.

(6) The length of time the employee is employed.

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[3] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 102, 689 P.2d 787 (1984).

[4] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[5] *Wallis,* 236 Kan. at 102-03; citing *Jones v. City of Dodge City*, 194 Kan. 777, 780, 402 P.2d 108 (1965).

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.[6]

In *Hill*[7]*,* the Court of Appeals stated the court primarily applied the right to control test, but generally considered several additional factors, including:

> "(1) [t]he existence of the right of the employer to require compliance with instructions;
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> "(2) the extent of any training provided by the employer;
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> "(3) the degree of integration of the worker's services into the business of the employer;
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> "(4) the requirement that the services be provided personally by the worker;
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> "(5) the existence of hiring, supervision, and paying of assistants by the workers;
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> "(6) the existence of a continuing relationship between the worker and the employer;
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> "(7) the degree of establishment of set work hours;
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> "(8) the requirement of full-time work;
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> "(9) the degree of performance of work on the employer's premises;
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> "(10) the degree to which the employer sets the order and sequence of work;
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> "(11) the necessity of oral or written reports;
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> "(12) whether payment is by the hour, day or job;
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> "(13) the extent to which the employer pays business or travel expenses of the worker;
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> "(14) the degree to which the employer furnishes tools, equipment, and material;
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> "(15) the incurrence of significant investment by the worker;
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> "(16) the ability of the worker to incur a profit or loss;

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[6] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

[7] *Hill v. Kansas Dept. of Labor*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 (2009), *aff'd in part, rev'd in part*, 292 Kan. 17, 248 P.3d 1287 (2011).

"(17) whether the worker can work for more than one firm at a time;

"(18) whether the services of the worker are made available to the general public;

"(19) whether the employer has the right to discharge the worker; and

"(20) whether the employer has the right to terminate the worker."[8]

Claimant's relationship with respondent appears to be a mixture of employee and independent contractor. The job was a one-day event for a fixed price. There was no guarantee of full-time work after this job was completed and claimant was not limited by this job to work only for respondent. However, it was clear Mr. Ross controlled claimant's activities, furnished the only equipment necessary to complete the job and controlled the process and progress of the job. Additionally, all expenses and travel arrangements were made by Mr. Ross and the activities, while not normally within the responsibilities of Mr. Ross, were a part of the regular business of respondent.

The Board finds claimant was an employee of respondent while performing these driving duties and the accident on July 11, 2013, arose out of and in the course of that employment relationship.

The Award grants claimant both TTD and medical compensation from this accident. However, neither claimant nor his legal representative appeared at the regular hearing in this matter. The only evidence of whether claimant was temporarily and totally disabled, or for how long, is found in the preliminary hearing. Claimant testified that at the time of the preliminary hearing he remained off work under doctor's orders. This period, from the date of accident to the date of the preliminary hearing constitutes 9.86 weeks. The Board finds claimant has proven entitlement to 9.86 weeks of TTD at $166.67 per week, or $1,643.37. This results in an overpayment of $2,663.42. The record is void of information regarding claimant's work status after the preliminary hearing. Claimant is denied TTD after the date of the preliminary hearing.

No evidence of what medical treatment was provided or how much that treatment cost exists in this record. None of the medical documents attached to the preliminary hearing are included in this record, pursuant to K.S.A. 44-519. It is claimant's burden to prove his entitlement to benefits under the Workers Compensation Act. Here, claimant has failed in that burden. The Award granting TTD beyond $1,643.37 and the medical expenses ordered paid from the preliminary hearing order is reversed.

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[8] *Id.* at 222-223.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed in part in that claimant is found to be an employee of respondent and the accident on July 11, 2013, arose out of and in the course of that employment relationship. However, the Award is modified to award claimant 9.86 weeks of TTD in the amount of $1,643.37. Claimant is denied any additional TTD or medical treatment expense resulting from this accident. Claimant has failed to prove what amounts, if any, are due for additional TTD or the provided medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated October 19, 2015, is affirmed in part, modified in part and reversed in part as above ordered.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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